

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE FOOTBALL ASSOCIATION
PREMIER LEAGUE LIMITED, BOURNE
CO. (together with its affiliate MURBO
MUSIC PUBLISHING, INC.), CHERRY
LANE MUSIC PUBLISHING
COMPANY, INC., CAL IV
ENTERTAINMENT LLC, ROBERT TUR
d/b/a LOS ANGELES NEWS SERVICE,
NATIONAL MUSIC PUBLISHERS'
ASSOCIATION, THE RODGERS &
HAMMERSTEIN ORGANIZATION,
STAGE THREE MUSIC (US), INC.,
EDWARD B. MARKS MUSIC
COMPANY, FREDDY BIENSTOCK
MUSIC COMPANY d/b/a BIENSTOCK
PUBLISHING COMPANY, ALLEY
MUSIC CORPORATION, X-RAY DOG
MUSIC, INC., FÉDÉRATION
FRANÇAISE DE TENNIS, THE MUSIC
FORCE LLC, and SIN-DROME
RECORDS, LTD. on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

YOUTUBE, INC., YOUTUBE, LLC and
GOOGLE, INC.,

Defendants.

Case No. 07 Civ. 3582 (LLS)

**CLASS PLAINTIFFS' STATEMENT
OF UNCONTROVERTED
MATERIAL FACTS IN SUPPORT
OF THEIR MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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INTRODUCTION

Class Plaintiffs (hereinafter “the Class” or “Class Plaintiffs”) submit this Statement of Uncontroverted Material Facts (“SUF”), with references to supporting record evidence, pursuant to Local Rule 56.1. By reason of these facts, the Class Plaintiffs demonstrate that there is no genuine dispute that Defendants YouTube, Inc., YouTube, LLC, and Google, Inc. (collectively, “Defendants”) do not satisfy one or more of the essential elements of their affirmative defense to copyright liability under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512 (1998), with respect to the Class Plaintiffs. As a consequence, any other DMCA factual disputes that may exist have been rendered immaterial, and no genuine issues of material fact remain with respect to Defendants’ First Defense (DMCA Safe Harbor) (“Safe Harbor Defense”) asserted in Defendants’ Answer to Second Amended Class Action Complaint. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Class Plaintiffs thus are entitled to partial summary judgment dismissing Defendants’ Safe Harbor Defense as a matter of law.

In order to minimize the burden on the Court, Class Plaintiffs hereby incorporate, as if fully set forth herein, the Statement of Uncontroverted Facts submitted by the plaintiffs in *Viacom Int’l. Inc., et al v. YouTube Inc., et al*, No. 07 Civ. 2103 (LLS). This separate SUF addresses other issues applicable to Class Plaintiffs. Except where otherwise noted, all materials cited herein are exhibits to the accompanying Declaration of Elizabeth Anne Figueira In Support of Class Plaintiffs’ Motion for Partial Summary Judgment. For ease of reference, the tab of the Figueira Declaration containing the referenced materials is noted with each citation.

Statement of Unconverted Facts ("SUF")	
Parties	
<p>1. The Class Plaintiffs include named plaintiffs The Football Association Premier League Limited, Bourne Co. (Together With Its Affiliate Murbo Music Publishing, Inc.), Cherry Lane Music Publishing Company, Inc., Cal IV Entertainment LLC, Robert Tur d/b/a/ Los Angeles News Service, National Publishers' Association, The Rodgers & Hammerstein Organization, Stage Three Music (US), Inc., Edward B. Marks Music Company, Freddy Bienstock d/b/a Bienstock Publishing Company, Alley Music Corporation, Fédération Française de Tennis, The Music Force LLC and Sin-Drome Records, Ltd.</p>	<p>Second Amended Complaint (11/26/08) ¶¶ 2, 3, 10-33, 45. (Tab 138)</p>
<p>2. Defendants are YouTube LLC, YouTube, Inc., and Google, Inc., which are affiliated entities involved in the management and/or operation of the YouTube website (www.youtube.com) ("YouTube").</p>	<p>Second Amended Answer (1/16/09) ¶¶ 34, 35, 37. (Tab 139)</p>
<p>3. YouTube is a major media entertainment company, which has over 98 million visitors per month and more than 17.5 billion pageviews per month in the United States.</p>	<p>Google to Acquire YouTube for \$1.65 Billion in Stock, Google Press Center, October 9, 2006 ("Founded in February 2005, YouTube is a consumer media company... [that] has quickly become the leading destination on the Internet for video entertainment... with 65,000 new videos per day were being uploaded daily." (Tab 134)</p> <p>October 9, 2006 – Fair Disclosure Wire – Google To Acquire YouTube for \$1.65 Billion in Stock – Final: "YouTube is a "global media platform." (Tab 135)</p> <p>July 17, 2008 – Fair Disclosure Wire – Q2 2008 Google Earnings Conference Call – Final (YouTube is "a new form of video entertainment." (Tab 136)</p> <p>"YouTube Fall 2009"</p>

	<p>http://www.gstatic.com/youtube/engagement/platform/autoplay/advertise/downloads/YouTube_InTheKnow.pdf [last accessed March 4, 2010] ("July 2009: 98.1 million unique visitors, and 17.5 billion page views per month... 8.9 video views in July 2009.") (Tab 148)</p>
From Its Inception, YouTube Management Knew Copyrighted Content Generated Substantial Traffic to the Site.	
<p>4. Prior to Google's acquisition of YouTube in October 2006, YouTube management recognized the vast amount of unlicensed copyrighted content on the website and its value in attracting users to the site.</p>	<p>C. Hurley Ex. 41 (JK00007416) (Tab 47) (Chen: if we remove all that content, we go from 100,000 views a day down to about 20,000 views or maybe even lower. the copyright infringement stuff. I mean, we can presumably claim that we don't know who owns the rights to that video... who don't we just remove the XXX stuff for now?").</p> <p>Dunton Ex. 5 (GOO001-00507535-GOO001-00507540) (Tab 15) (Dunton to "tunawarrior" [Steve Chen]: "I did a little exercise on friday and went through all the most viewed/most discussed [sic]/top favorites/top rated to try and figure out what percentage is or has copyrighted material. it was over 70%." (p. 8)</p> <p>C. Hurley Ex. 33 (JK00005929) (Tab 45) (Chen: "first, regardless of the video they upload, people are going to be telling people about the site, therefore making it viral. they're going to drive traffic. second, it adds more content on the site. third, we're going to be adding advertisements in the future so this gets them used to it. i'm asking for a couple more weeks.")</p> <p>C. Hurley Ex. 38 (GOO001-01424047-48) (Tab 46) (Chen: "but we should just keep that stuff on the site. i really don't see what will happen. what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away. he gets in touch with cnn legal. 2 weeks later, we get a cease & desist letter. we take the video down.") (GOO001-01424047)</p> <p>Karim Ex. 25 (JK00009933-34) (Tab 62) (Karim: "I'd just remove the obviously copyright infringing stuff... none of the most favorite [sic] videos are movies or tv</p>

	<p>shows. we're ok cracking down on this content. <i>we'll leave music videos, news clip and comedy shows for now.</i>") (JK00009933) (emphasis added)</p> <p>Karim Ex. 40 (JK00006166-6169) (Tab 64) (Chen: "In other news, jawed, please stop putting stolen videos on the site. We're going to have a tough time defending the fact that we're not liable for the copyrighted material on the site because we didn't put it up when one of the co-founders is blatantly stealing content from another site and trying to get everyone to see it.")</p> <p>C. Hurley Ex. 6 (GOO001-00660582-83) (Tab 42) (Chen: "right, i understand those goals but, at the same time, we have to keep in mind that we need to attract traffic, how much traffic will we get from the personal videos? remember, the only reason why our traffic surged was due to a video of this type [the movies].") (GOO001-00660582)</p>
<p>5. YouTube management did not remove valuable copyrighted content from YouTube despite being aware of its extensive and unauthorized presence.</p>	<p>Karim Ex. 38 (JK00007479) (Tab 63) (Chen: "That way, the <i>perception</i> is that we are concerned about this type of material and we're actively monitoring it. [But the] actual removal of this content will be in varying degrees. That way, . . . <i>you can find truckloads</i> of . . . copyrighted content . . . [if] you [are] actively searching for it."). (emphasis added)</p> <p>Karim Ex. 25 (JK00009933-34) (Tab 62) (Karim: "I'd just remove the obviously copyright infringing stuff...none of the most favorite videos are movies or tv shows. we're ok cracking down on this content. we'll leave music videos, news clip and comedy shows for now.") (JK00009933)</p> <p>C. Hurley Ex. 38 (GOO001-01424047-48) (Tab 46) (Chen states that content should remain on the site.)</p> <p>C. Hurley Ex. 41 (JK00007416) (Tab 47) (Chen states that YouTube can "presumably claim" that they are unaware of infringing content and wait for a DMCA notice).</p> <p>Karim Ex. 40 (JK00006166-6169) (Tab 64) (YouTube founder uploads unlicensed video to the site.)</p>

	<p>Karim Ex. 22 (JK00004969) (Tab 61) (Chen: “for these mixed videos with music backgrounds, will we get in trouble for them because the music is copyrighted?... Hurley: I wouldn’t be too concerned for now.”)</p> <p>C. Hurley Ex. 6 (GOO001-00660582-83) (Tab 42) (Premium content causes user traffic to “surge”).</p> <p>C. Hurley Ex. 33 (JK00005929) (Tab 45) (Chen: “first, regardless of the video they upload, people are going to be telling people about the site, therefore making it viral. they’re going to drive traffic. second, it adds more content on the site. third, we’re going to be adding advertisements in the future so this gets them used to it. I’m asking for a couple more weeks.”)</p> <p>Dunton Ex. 5 (GOO001-00507535-GOO001-00507540) (Tab 15) (discussing the percentage of copyrighted videos on YouTube.)</p>
<p>6. YouTube has been and is capable of identifying and removing copyright infringing and other “inappropriate” content from the website through, among other things, proactive searches by YouTube personnel and “community flagging” by users; it deploys such practices when removal corresponds to its financial interests.</p>	<p>Schaffer Ex. 12 (GOO001-00561567-82) (Tab 107) (“Introduction to Content SQUAD, Google Sales Conference 2007”) (“Community Flagging... • Users police YouTube by flagging inappropriate content for review”</p> <ul style="list-style-type: none"> • All flagged videos are reviewed by the YouTube Content SQUAD), 24 hours a day, 365 days a year • Flagged videos are routed into queues, team members are able to collaborate and escalate difficult decisions to higher tiers • 75% Of all flagged videos are reviewed within three minutes, most are reviewed within 30 seconds • Child pornography is typically flagged and removed within minutes of being uploaded • Pornography is typically flagged and removed within the first 100 views”) (GOO001-00561577) <p>Gillette Ex. 1 (GOO001-00757950) (Tab 27) (Gillette: “This content should be <i>removed</i> from the FAQ immediately. It in itself makes it so we are not protected by the DMCA: What are you doing to prevent content that violates your policies from appearing in YouTube?: <i>We do a preliminary review on uploaded videos through both a manual and automated process.</i> Although we try our best to detect and remove videos that violate our policy guidelines, our review process is primarily focused on removing adult content or obvious copyright</p>

	<p>violations, and is not bulletproof. However, we encourage our viewers to notify us when they discover policy violations or copyright issues -- we <i>have</i> a process for reviewing reported policy violations, and respond to reported copyright violations under the Digital Millennium Copyright Act.”)</p> <p>Schaffer Ex. 6 (GOO001-00839895) (Tab 105) (Schaffer: “Hey guys, Weezer is on our list of content that we pro-actively scan for (as per the RIAA). We should probably de-feature this http://www.youtube.com/watch?v=IU6sdCeY1Q8 even though it's a cover band, it still needs to be cleared... :(It'll probably wind up Copyright Reject w/ Strike next time we scan for Weezer.”)</p> <p>Schaffer Ex. 8 (GOO001-00840004-06) (Tab 106) (YouTube chart for tracking entertainment content proactively on the site.)</p> <p>Gillette Ex. 4 (GOO001-00839851) (Tab 28) (Gillette: “Need help with proactive scans [...] a list of all of the earlier infringement notifications that we have received, and I would like you to cycle through this once a day and search for their content on our site. If you see a lot for any of the content owners, you could also ask whoever is working that day in support to help you to ferret more out.”)</p> <p>B. Hurley Ex. 7 (GOO001-00629095) (Tab 40) (B. Hurley: “please reject any nudity/porn and any death videos, along with anything else that’s glaringly inappropriate. As far as copyright stuff is concerned , be on the look out for Family Guy, South Park, and full-length anima episodes... music videos and news programs are fine to approve.”)</p> <p>Dunton Ex. 5 (GOO001-00507535-GOO001-00507540) (Tab 15)</p> <p>Gillette Tr. 94:12-99:6 (Tab 32) (Explanation of YouTube review process)</p>
7. For a brief period in September 2005, YouTube’s “community flagging” feature permitted users to	Karim Ex. 38 (JK00007479) (Tab 63) (Chen: “we’ve implemented a flagging system so you can flag videos as being inappropriate or copyrighted.”)

<p>flag unauthorized copyrighted content, but YouTube discontinued it in order to claim ignorance of the copyright infringing content on the site.</p>	<p>C. Hurley Ex. 11 (JK00008043) (Tab 43) (Chad Hurley: "can we remove the flagging link for 'copyrighted' today? we are starting to see some complaints for this and basically if we don't remove them we could be held liable for being served a notice. it's actually better if we don't have the link there at all because then the copyright holder is responsible for serving us notice of the material and not the users.")</p> <p>B. Hurley Ex. 3 (JK00008393) (Tab 39) (Chad Hurley: "we took it down, because, as stated in the Digital Millennium Copyright Act, we're only obligated to remove content when contacted directly by the copyright owner. We don't want random users to flag things as copyrighted because they don't own the content.")</p>
<p>8. YouTube no longer undertakes proactive searches generally for copyright infringing content (but only for select partners).</p>	<p>Levine Ex. 10 (GOO001-00839903) (Tab 84) (Gillette: "Other than American idol and SNL, please stop the stop the scans so that we can spend more time on email.")</p> <p>Gillette Tr. 73:22-74:10 (Tab 31) ("A: I do not recall actually the -- the periods where we did proactive scanning when -- when exactly they were. Q: Do you recall when it -- well, did it ever stop? A: Yes, it did. Q: Okay. Do you recall when? A: I recall that it was pre-acquisition. I'm fairly sure. I do not recall how early on we actually decided to stop doing that. Q: Who at YouTube made that decision to stop doing that? A: I believe legal. It was a legal decision.")</p>
<p>9. By exploiting unlicensed copyrighted material, YouTube's founders/management effectively implemented a plan to derive financial benefits from both the operation of the site and the eventual sale of the site.</p>	<p>Google to Acquire YouTube for \$1.65 Billion in Stock, Google Press Center, October 9, 2006 ("Founded in February 2005, YouTube is a consumer media company... [that] has quickly become the leading destination on the Internet for video entertainment." (Tab 134)</p> <p>Dunton Ex. 4 (GOO001-00507525-32) (Tab 14) (Chen: "concentrate all of our efforts in building up our numbers as aggressively as we can through whatever tactics, however evil.") (GOO001-00507526)</p> <p>Karim Ex. 9 (JK00009871-72) (Tab 60) (Karim: "Our</p>

	<p>goal is to use funding to pursue a two-phased approach. First we will further grow our audience and reach to secure our position as the #1 place for personal videos on the internet. Then we will monetize the audience we have acquired by hosting video ads.”) (JK00009871)</p> <p>C. Hurley Ex. 38 (GOO001-01424047-48) (Tab 46) (Hurley emphasizes that “serious traffic” will allow them to sell YouTube for “big money.”)</p> <p>C. Hurley Ex. 12 (Tab 44)</p> <p>C. Hurley Tr. 107:14- 108:20 (Tab 49) (SPEAKER 1: “It was like pretty impressed. You’re basically right. It’s like anywhere on the Internet you have a little that can control and, you know, basically serve up ads, and the whole of things with tags and, you know, what our viewers have seen before the flash. It’s pretty --</p> <p>SPEAKER 2: So if we get them involved, at what point would we tell them our dirty little secret, which is that <i>we actually just want to sell out quickly</i>? SPEAKER 1: Are you filming? You’re going to actually have to erase this. SPEAKER 2: No. It won’t be released until after the acquisition.” MR. BROWNE: Q: Now, Mr. -- stop that. Now, Mr. Hurley, have you ever seen that video before? A: I don’t remember it. Q: Okay. Did you recognize the two individuals that were on camera during that video? A: I recognize Steve and myself, and it sounded like Jawed’s voice. Q: Okay. And it sounded like -- and Mr. Karim’s voice on the video, you recognized that? A: It sounded like it. Q: Did you hear yourself say on -- on -- on that video that -- that you have to -- something like “we’ll have to erase the file”? A: I mean, yeah, it seemed like a pretty sarcastic remark to his sarcastic comment.”)</p>
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<p>10. The YouTube founders had extensive experience building internet businesses, and their explicit goal was to build an audience as quickly as possible to maximize value in an expected sale of the business.</p>	<p>Karim Ex. 1 (Resume – PayPal employee 2000-2005) (Tab 59)</p> <p>Karim Tr. 16:12-17:3 (Tab 65)</p> <p>C. Hurley Tr. 16:20-17:16 (Tab 48) (YouTube's founders had significant experience developing internet businesses through prior job experience at PayPal.)</p> <p>Ebay Press Release (October 3, 2002) http://investor.ebay.com/releasedetail.cfm?ReleaseID=91641 (Tab 133) (ebay bought Paypal in 2002 for \$1.5 billion)</p>
<p>Google Purchased YouTube After Failing to Succeed with A Competing Website and Adopted YouTube's Policies</p>	
<p>11. Google acquired YouTube for more \$1.65 billion in October 2006, because YouTube had attracted substantially more users than Google's competing website, known as Google Video.</p>	<p>Google to Acquire YouTube for \$1.65 Billion in Stock, Google Press Center, October 9, 2006 (Tab 134)</p> <p>Schmidt Tr. 53:9-24 (Tab 110) ("Q And as best you can recall, can you tell us what reasoning you explained [to the Board]? A Sure. This is a company with very little revenue, <i>growing quickly with user adoption, growing much faster than Google Video</i>, which was the product that Google had.... And we ultimately concluded that 1.65 billion included a premium for moving quickly and making sure that we could participate in the user success of YouTube.") (emphasis added)</p> <p>Kordestani Ex. 10 (GOO001-00496021-62) (Tab 78) ("Google Video... Topics discussed at this GPS... discuss competitive position vs YouTube and MySpace Video") (GOO001-00496023)</p> <p>Schmidt Ex. 2 (CSSU003560-86) (Tab 108) (Storm Duncan – Credit Suisse – Project Snowmass: "60% of total video streams on Yellow [codename for YouTube] website are 'Premium'... 40% of total video streams non Yellow [YouTube] are non-Premium... Non-Premium Content is user generated videos and is segmented between high value and regular content") (CSSU003570)</p> <p>Walker Ex. 14 (GOO001-00502527-54) (Tab 118)</p>

	<p>("GV can be the best partner to content owners... Respect copyrights of premium content owners (we should beat YouTube by improving features and user experience, not being a 'rogue enabler' of content theft")) (GOO001-00502536)</p>
<p>12. Prior to its acquisition of YouTube in October 2006, Google Video implemented policies and practices to identify and remove infringing content that appeared on Google Video through, among other things, proactive screening of uploads, when removal corresponded with its financial interests.</p>	<p>GOO001-00923351-52 (Tab 152) (P. Walker: "I'll be attending a seminar on Wednesday (tomorrow) in Dublin with heads of several major sports teams and leagues. I would be much appreciated if you could have a quick look through the index and post on the sparrow page/take down any clearly infringing, official broadcast footage that you notice from these right holders below... Liverpool Football FC... Chelsea Football FC... Manchester United Football Club... Arsenal Football Club... Sky Sports.") (GOO001-00923351)</p> <p>Narasimhan Ex. 4 (GOO001-00794737-58) (Tab 93) (June 28, 2006 email and attached deck on GV review of illegal uploads. Narasimhan writes to Eun: "We catch around 10% of all online user uploaded videos during review. Of these approximately 90% is disapproved due to copyright violation, and the rest due to policy (porn, violence, etc.") (GOO001-00794737)</p> <p>Kordestani Ex. 10 (GOO001-00496021-62) (Tab 78) ("Today – zero tolerance on copyright, violence and hate... enforced with proactive screening before the video goes live... reject mixed use if more than 50% is recognizable copyright") (GOO001-00496037)</p> <p>Eun Tr. 130:3-17 (Tab 26) ("Q: So the existing policy at the time of this draft document was a zero tolerance on copyright as well as porn, violence and hate. And that was enforced with proactive screening before the video went live, correct? A: Yeah. I have no reason to dispute that what this is the current policy was not, you know, was not anything but the current policy back then.")</p> <p>Patrick Walker Ex. 9 (Tab 117) (Bill Kipp: "Authoritative 3rd party data sources for movie titles, song lists, etc... Patrick [Walker] create a nice list of sports-related content providers and subjects to help us with our search for unauthorized content... Soccer</p>

	<p>(Football) Most Followed Leagues (use both league/competition names and team/club names)... English Premier League... German Bundesliga... Scottish Premier League... Tennis... Top Competitions: Wimbledon, US Open, Australian Open, Roland Garros (French Open)...") (GOO001-00313643-00313646)</p>
<p>13. Google analyzed YouTube prior to and during the acquisition process and concluded that YouTube contained and displayed substantial quantities of copyrighted material that was not authorized to appear on the site.</p>	<p>Eun Ex. 12 (GOO001-00496651-54) (Tab 23) ("I think we should beat YouTube – and all competitors – but not at all costs. A large part of their traffic is from pirated content. When we compare our traffic numbers to theirs, we should acknowledge that we are comparing out 'legal traffic' to their mix of traffic from legal and illegal content.") (GOO001-00496651)</p> <p>Walker Ex. 14 (GOO001-00502527-54) (Tab 118) (Google concluded that YouTube was a 'rogue enabler' of content theft.") (GOO001-00502536)</p> <p>Schmidt Ex. 2 (CSSU003560-86) (Tab 108) (Credit Suisse Analysis had calculated percentages of Premium content.) (CSSU003570)</p> <p>Schmidt Ex. 8 (GOO001-00496614-47) (Tab 109) (Content Acquisition Strategy Update: "Premium Content Owners... perceive You Tube as trafficking mostly illegal content – it's a Video Grokster.... YouTube is getting more traffic and engagement than Google Video today.... Qualitative research in 4 countries reveals the reasons behind this... YouTube's content is all free, and much of it is highly sought after pirated clips.") (GOO001-00496619-20; GOO001-004966330)</p> <p>Storm Duncan Ex. 13 (CSSU002686) (Tab 176) (Ullah: "Snowmass video analysis [of YouTube]... Prem/rem ... 63%... Premium/removed- means the content is copyright (either in whole or in substantial part) and removed were links that were taken down.")</p> <p>Duncan 30(b)(6) Tr. 89:24-90:6 (Tab 177); 92:20-93:17 (Tab 178) ("A: My recollection of the 424 is that it's a - it says at the top of the e-mail, 'Some manual analysis we did,' was that it was a study that the Google folks had performed studying, you know, a number of randomly generated or chosen videos, and that 424 is</p>

	<p>the number that they had randomly chosen and -- and were able to categorize with these subcategorizations.” 92:20-93:17 (Tab 178) (“Q: And the premium/removed category includes content that is copyrighted in whole or substantial part, plus removed, which are links that were taken down; right? A: Yeah, that’s how it’s categorized here from -- from the Google folks. Q: And the no category is categorized here by the people from Google as no copyright but includes commercials, trailers, public service, promos, and true UGC; right?...”)</p>
<p>14. Google management recognized the risk of infringement liability arising from YouTube’s policies and practices, but nonetheless sought to expand its business by continuing those policies and practices.</p>	<p>Schmidt Ex. 2 (CSSU003560-86) (Tab 108) (Credit Suisse Analysis had calculated percentages of Premium content.) (CSSU003570)</p> <p>Schmidt Tr. 109:20-21 (Tab 111) (“our policy from acquisition was to grow the user base.”)</p> <p>Yu Ex. 9 (SC009721-26) (Tab 125) (Term Sheet for the Acquisition of YouTube, Inc. By Google, Inc. – “Indemnification of Google... the representations and warranties related to intellectual property shall survive for three years.”) (SC009725)</p> <p>Schmidt Ex. 8 (GOO001-00496614-00496647) (Tab 109) (Google perceived You Tube as “trafficking mostly illegal content – it’s a Video Grokster.”) (GOO001-00496619-20; GOO001-004966330)</p> <p>Narasimhan Ex. 8 (GOO001-06555098-99) (Tab 94) (“Google Video Community Policing Change... “tonight we are planning on changing our process for reviewing videos on Google Video... Videos under 11 mins will be indexed and will go live without review... “on the front end, users will be able to flag videos as inappropriate and will be able to specify from one of the following categories: pornography, obscenity, graphic violence, racially or ethnically hateful content, and other content inappropriate for young viewers.”) (GOO001-06555098)</p>
<p>Defendants Have Clear Knowledge of Extensive Infringing Content on YouTube</p>	
<p>15. YouTube identifies “premium” content on its site and</p>	<p>Maryrose Dunton Tr. 84:12-85:9; 89:5-18 (Tab 18) (Tab 18) (“Q: Okay. Then you respond ‘oh, what I meant to</p>

<p>understands that this content is copyrighted, routinely uploaded without authorization, and a major attraction that generates traffic.</p>	<p>say after I found that 70%, I went and flagged it all for review.' What does it mean to flag it for review? A: At the time, it meant it goes into a queue that somebody at YouTube reviews. Q: Reviews for what purpose? A: They can review it for many different purposes. Things are flagged because users find them inappropriate. Anything that users feel break our Terms of Use. Q: Okay. But you did not flag it all for review; did you? A: I don't know. I don't believe I flagged the videos I saw on the most viewed for review. Q: Okay. This is a joke; right? You're being sarcastic -- A: Which part? Q: -- in the IM? A: Which part? Q: That you went and flagged it all for review? A: I'm probably being sarcastic, yes.... "Q: You then say 'because we've got to work towards having a site 100% free of copyrighted material, ya know.' You were being sarcastic there again; weren't you? A: I don't know if I was being sarcastic. As I said, we used the terms 'copyrighted' and 'premium - ' we exchanged those two terms quite a bit. I thought it was -- yes, this is true. I didn't think it was possible to have a site 100 percent free, nor why would we want to, of premium, of professionally produced content. We had premium professional produced content since the beginning of YouTube.")</p> <p>July 16, 2009 – Fair Disclosure Wire – Q2 2009 Google Earnings Conference Call – Final (Tab 142) ("HEATH TERRY: And in terms of being able to monetize the non-professional side of that inventory? ERIC SCHMIDT: It has not been our focus. It is probably possible to do so, but the fact of the matter is that the majority of the non-professional content has a relatively small number of viewers. It is difficult to target it accurately. There is too much variation and so forth, whereas the professional here, and remember, professional here just doesn't mean big studios.") (p. 10)</p> <p>April 16, 2009 – Fair Disclosure Wire – Q1 2009 Google Q&A Session – Final (Tab 141) (Jonathan Rosenberg: "what we're hearing from both viewers and advertisers is that they want premium content and the premium viewing experience.") (p. 4)</p> <p>Eun Ex. 27 (GOO001-00238624-25) (Tab 25) (Eun: "Our preliminary analysis indicates that anywhere from ~ 40% to as high as ~70% of search queries may</p>
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	<p>involve premium terms. While the playbacks evidence a far smaller percentage of premium clips (as far as we can tell without digging too much under the hood), <i>it seems that premium content/brands are an important element to bringing people into the YT house. My guess is that once they're in, they decide to stay a while.</i> I've asked to see if there's a difference in total views for people who come in through search vs. browsing vs. links in email; and whether there's a difference for those who have searched for premium terms.” (GOO001-00238624) (June 26, 2007) (emphasis added)</p> <p>Ellerson Ex. 10 (GOO001-02519867-73) (Tab 22) (Ellerson: “Our opinion – based in particular on the recent analysis... done on query stream data... is that Chad’s initial conclusion [that ‘users... don’t want to watch professionally produced content’] is not correct. This data suggests that our users do want to watch professional content, be we haven’t yet licensed the content that they’re looking for.... Of the Top 100 Playback Queries... Music = [REDACTED] ... Non –Music Premium = [REDACTED] Of ‘Premium’ content queries: ... Sports = [REDACTED] ... News = [REDACTED]”) (GOO001-02519871)</p> <p>B. Hurley Ex. 18 (GOO001-01016964-86) (Tab 41) (Content Lead Discussion – June 26, 2007: “users are searching for lots of things, but primarily for premium content.”) (GOO001-01016969)</p> <p>King Ex. 2 (GOO001-01403792-93) (Tab 66) (Tony Lee, Technical Product Manager: “Music content is a key element to Youtube’s success. Premium music content is the most watched genre of content on YouTube. Thus, it is imperative that we acquire, and allow content owners to claim, as much content as possible to promote the growth and success of YouTube.”) (GOO001-01403792)</p> <p>Reider Ex. 7 (GOO001-00074410-11) (Tab 98) (George Strompolos: “There are three kinds of YouTube content partnerships: 1. Premium. Premium partnerships are usually established with large, mainstream content providers such as TV networks, cable stations, sports leagues, large content hosting websites, and film studios. These are typically negotiated deals that may involve content commitments and promotional</p>
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	<p>guarantees.”) (GOO001-00074410)</p> <p>Schmidt Ex. 2 (CSSU003560-86) (Tab 108) (Credit Suisse Analysis had calculated percentages of Premium content.) (CSSU003570)</p>
<p>16. Defendants conducted analyses of “query streams” (search results) and identified with specificity premium content across a broad range, including infringing content, that is popular among YouTube’s users.</p>	<p>Ellerson Ex. 10 (GOO001-02519867-73) (Tab 22) (Ellerson: “Our opinion – based in particular on the recent analysis... done on query stream data... is that Chad’s initial conclusion [that ‘users... don’t want to watch professionally produced content’] is not correct. This data suggests that our users do want to watch professional content, but we either haven’t yet licensed the content that they’re looking for, or, for content that we have licensed, we are not doing the best job that we can to surface that content for users... Of the Top 100 Playback Queries... Music = ██████... Non –Music Premium = ██████ Of ‘Premium’ content queries: ... Sports = ██████... News = ██████”) (GOO001-02519871)</p> <p>Eun Ex. 25 (GOO001-00986823-26; GOO001-00986825-997) (Tab 24) (“Top 10K queries... “Searches do reflect popularity pretty well... Fresh content is being searched for consistently... Music, TV Shows, Movies, Celebrities, Sports, etc, are definitely our top categories to attack...” (GOO001-00986823)</p> <p>Zameczkowski Ex. 23 (GOO001-01316227-29.0019) (Tab 132) (“Weekly report with top searches of April 25”) (GOO001-01316227-29.0013)</p> <p>Zameczkowski Ex. 14 (GOO001-00214966-67) (Tab 127) (Walker: “[...] there’s a deadline mid next week to put in a proposal for English Premier League rights globally and we’re trying to run some commercial models to gauge [sic] value based on video usage in the categories listed below....[which] might become a recurring need... For the following terms:</p> <ol style="list-style-type: none"> 1. soccer 2. football 3. Premier League (sp?) <p>...what are:</p> <ol style="list-style-type: none"> a. # searches for the above done on YT daily b. # titles with tagged with the above c. # titles with the above in the title text”) <p>(GOO001-00214966)</p>

	<p>Levine Ex. 21 (GOO001-00707313) (Tab 85) (“... there are millions of Football goals on YouTube... Here are several copies of the video that other people have uploaded http://www.youtube.com/results?search_query=saha+fulham &search=Search”)</p> <p>King Ex. 2 (GOO001-01403792-93) (Tab 66) (Tony Lee: “music content is a key element to YouTube’s success. Premium music content is the most watched genre of content on YouTube.”) (GOO001-01403792)</p> <p>GOO001-00923351-52 (Tab 152) (P. Walker: “I’ll be attending a seminar on Wednesday (tomorrow) in Dublin with heads of several major sports teams and leagues. I would be much appreciated if you could have a quick look through the index and post on the sparrow page/take down any clearly infringing, official broadcast footage that you notice from these right holders below... Liverpool Football FC... Chelsea Football FC... Manchester United Football Club... Arsenal Football Club... Sky Sports.”) (GOO001-00923351)</p>
<p>17. Defendants adhere to a policy that they would only take down videos in response to a formal DMCA notice, and then only remove the specific URLs listed in the individual notice and only future uploads that specifically match the unique “hash mark” known as a “md5 hash” that YouTube created for each URL.</p>	<p>Gillette Ex. 13 (GOO001-00041715-20) (Tab 30) (The YouTube Team to user: “To file a notice of infringement with us, you must provide a written communication that sets forth the items specified below. To expedite our ability to process your request, please use the following format (including section numbers): 1. Identify in sufficient detail the copyrighted work that you believe has been infringed upon, including the owner of the work. For example, ‘The copyrighted work at issue is the video titled ‘My Video produced by me.’ ... 2. Identify the material that you claim is infringing the copyrighted work listed in item #1 above. YOU MUST IDENTIFY EACH VIDEO THAT ALLEGEDLY CONTAINS INFRINGING MATERIAL. This requires you to specify the URL of the playback page for that video (like this: http://www.youtube.com/watch?v=QCVxQ_3Ejkg).”) (GOO001-00041718)</p> <p>C. Hurley Ex. 38 (GOO001-01424047-48) (Tab 46) (Chen advised that videos should remain on the site</p>

	<p>regardless of knowledge until YouTube receives as "cease & desist letter.") (GOO001-01424047)</p> <p>C. Hurley Ex. 41 (JK00007416) (Tab 47) (Chen stated that YouTube can "presumably claim" that they are unaware of infringing content and wait for a DMCA notice).</p> <p>P. Walker Tr. 222:17-223:12 (Tab 122) ("Q: You said that YouTube makes tools available to content owners to monitor their rights. What tools are you referring to? Do they have names? A: There is the standard DMCA notification process, which is submitting either in bulk or on an individual URL basis the content they would like to be removed, which we do remove. And there is the development of a tool that we call CVT or content verification program, which would allow them to use search tools to pull up clips that had -- that responded to the queries that they insert. Then they would be able to look at those clips that came up in response to their search queries. They would then be able to, within that tool, review those videos and determine whether or not it was, in fact, in their opinion, an unauthorized use. They could tick a box indicating removal, click a button, and we would have a batch list sent to us that would be automatically removed.")</p> <p>P. Walker Tr. at 216:25-218:4 (Tab 121) (THE WITNESS: When anyone, including the Premier League, indicates to me that their content is on YouTube, what I tell each and every one of them is, why is it still there if you don't want it there? The tools are available to you to have it removed if you object to its presence there. Q: And you said that to the Premier League officials? A: Yes. Q: And what did they say in response? A: They said that we should, meaning YouTube should take it down. To which I responded, you are the only one that knows which clips are the ones that might be unauthorized, and you must follow procedures for its removal through the DMCA process.")</p> <p>Matthew Liu Ex. 15 (GOO001-07171324-07171353) (Tab 89) ("MD5 Hashes - YouTube uses the checksum of the video binary that the user uploads to create an MD5 hash. YouTube then compares that MD5 hash to a</p>
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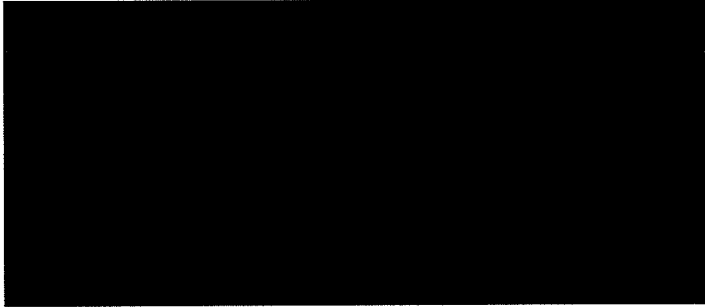
	<p>database of reference hashes. Hash comparisons work most effectively when two videos are completely identical.”) (GOO001-07171347)</p> <p>K. Walker Tr. 130:14-18 (Tab 116) (“YouTube had a system called MD5 hashing, which identified unique copies of a given video, and when we received a DMCA notice for one version, I believe we would block other versions that also had that same hash.”)</p> <p>Cuong Do Tr. 134:21-135:2 (Tab 11) (“Q. And I think you said if you have exactly the same content in another file as the original video file, it would produce the exact same Hash. Is that right? A. That's right. Q. But if you change the content one iota, it produces a different Hash? A. That's right.”)</p>
18. Defendants permit videos containing content that had been the subject of DMCA takedowns to be reposted on the website.	<p>Levine Ex. 24 (GOO001-01918032) (Tab 86) (Fuji Television: “Even if a video of a certain program is deleted, the same content is uploaded, again, over and over. We are very disappointed at how unproductive this process is...”)</p> <p>Gillette Ex. 13 (GOO001-00041715-20) (Tab 30) (Copyright owner submits DMCA notices and states “I expect that there will be more videos uploaded this evening and into the night. I will continue to use the verification tool to request that you remove the videos that are infringing on our copyrights.”) (GOO001-00041716)</p> <p>Videos from YouTube (Tab 188) (Display of reposted clips of Class Plaintiffs’ works.)</p>
19. By their own analysis of content, including infringing content, on YouTube, Defendants recognize professionally produced sports programming as among the array of content attracting substantial viewership.	<p>Ellerson Ex. 10 (GOO001-02519867-73) (Tab 22) (Ellerson: “Our opinion – based in particular on the recent analysis... done on query stream data... is that Chad’s initial conclusion [that ‘users... don’t want to watch professionally produced content’] is not correct. This data suggests that our users do want to watch professional content, but we either haven’t yet licensed the content that they’re looking for, or, for content that we have licensed, we are not doing the best job that we can to surface that content for users... Of the Top 100 Playback Queries... Music = ██████ ... Non –Music Premium = ██████ Of ‘Premium’ content queries: ...</p>

	<p><i>Sports</i> = [REDACTED]... News = [REDACTED]" (emphasis added) (GOO001-02519869)</p> <p>Ellerson Ex. 9 (GOO001-03065453-306467) (Tab 21) (Ellerson: "Attached is the recommendation that we made to Dave [Eun]... Potential Target... English Premier League.")</p> <p>C. Hurley Ex. 41 (JK00007416) (Tab 47) ("take down whole movies. take down entire TV shows. take down XXX stuff. everything else keep including <i>sports</i>, commercials, news, etc.") (emphasis added)</p> <p>Zameczkowski Ex. 13 (GOO001-02341604-09) (Tab 126) (Premier League was "world's biggest and most recognized sporting leagues" and "already popular" on GV and YouTube.) (GOO001-02341605)</p> <p>Zameczkowski Ex. 18 (GOO001-00716143-45) (Tab 130) (Redic: "We are working on estimating the potential value of various sports content to YouTube. This requires us to estimate the number of video views that we could potentially experience if the content of certain content providers was on the site. For example, if we had UEFA [Union of European Football Associations] in 2008, what would be the potential number of views that we could see.") (GOO001-00716143)</p> <p>Zameczkowski Ex. 19 (GOO001-01655883-84.0003) (Tab 131) ("Premier League" is listed as a Tier 1 content partner, part of "Sporting organizations and clubs with international recognition.") (GOO001-01655883)</p> <p>Patrick Walker Ex. 9 (Tab 117) (Bill Kipp: "Authoritative 3rd party data sources for movie titles, song lists, etc... Patrick [Walker] create a nice list of sports-related content providers and subjects to help us with our search for unauthorized content... Soccer (Football) Most Followed Leagues (use both league/competition names and team/club names)... English Premier League... German Bundesliga... Scottish Premier League... Tennis... Top Competitions: Wimbledon, US Open, Australian Open, Roland Garros (French Open)...") (GOO001-00313643-</p>
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	<p>00313646)</p> <p>Walker Ex. 19 (GOO001-00922380-81) (Tab 119) ("FAPL Opportunity... Why do the deal?... <i>avoiding possible litigations for copyright infringements</i>... Proposed deal terms... Estimate license fee: between 5 to 10% of the International TV rights (€20 million [sic] over 3 years).") (GOO001-00922380) (emphasis added)</p> <p>Ellerson Ex. 9 (GOO001-03065453-306467) (Tab 21) (Ellerson: "Attached is the recommendation that we made to Dave [Eun]....Potential Target....English Premier League.")</p>
<p>20. YouTube has been repeatedly informed that sports content is being exploited on YouTube without authorization.</p>	<p>Zameczkowski Ex. 16 (GOO001-00221953) (Tab 128) (German Football League, Bundesliga, indicated to Defendant's employee Anthony Zameczkowski that it may join the class action lawsuit)</p> <p>Zameczkowski Ex. 17 (GOO001-02339707-13) (Tab 129) (La Liga (Spanish football) threatened litigation due to the presence of unlicensed content on YouTube) (GOO001-02339710)</p> <p>King Ex. 13 (12/12/08) (GOO001-01519154-55) (Tab 71) (Adam Coates emails: "I just had an interesting meeting with Ligue 1 who are considering joining the Premiership class action to sue YouTube.") (GOO001-01519154)</p> <p>Scottish Premier League (First Amended Complaint ¶ 33) (Tab 137)</p>
<p>21. Defendants concluded that Premier League was a sports entity with content on YouTube that could be exploited financially for YouTube's benefit.</p>	<p>Zameczkowski Ex. 13 (GOO001-02341604-09) (Tab 126) ("FAPL [Football Association Premier League] and YouTube... Why Do the Deal?... Prime content with which we can test and improve advertising in various geographies... Running models now. Aim for roughly \$40MM over three years – which is what we believe is roughly in range of competitive bids.") (GOO001-02341605; GOO001-02341609)</p> <p>Walker Ex. 19 (GOO001-00922380-81) (Tab 119) (See above)</p> <p>Zameczkowski Ex. 14 (GOO001-00214966-67) (Tab</p>

	<p>127) (Walker: “[...] there’s a deadline mid next week to put in a proposal for English Premier League rights globally and we’re trying to run some commercial models to guage [sic] value based on video usage in the categories listed below... [which] might become a recurring need... For the following terms:</p> <ol style="list-style-type: none"> 1. soccer 2. football 3. Premier League (sp?) <p>...what are:</p> <ol style="list-style-type: none"> a. # searches for the above done on YT daily b. # titles with tagged with the above c. # tales with the above in the title text”) <p>(GOO001-00214966)</p> <p>Zameczkowski Ex. 18 (GOO001-00716143-45) (Tab 130) (YouTube estimations of Premier League video views in excess of 30 million.) (GOO001-00716143; GOO001-00716145) (See above)</p> <p>Ellerson Ex. 10 (GOO001-02519867-73) (Tab 22) (See above)</p>
<p>22. YouTube did not license Premier League content despite knowledge that videos of Premier League footage on YouTube were unauthorized.</p>	<p>Molnar Ex. 19 (GOO001-01211705-14) (Tab 92) (Zameczkowski: “Dear Paul and Phil, I am working with Patrick Walker in the YouTube/Google Video EMEA team. According to the ITT you sent us on January 24th, the bidding form was supposed to be supplied 7 days after the date of issue of this ITT but we didn't receive it. Are you able to send us the bidding form shortly?”)</p> <p>(GOO001-01211707)</p> <p>P. Walker Tr. 227:10-228:14 (Tab 123) (YouTube “decided not to make a bid for these rights.”)</p> <p>Zameczkowski Ex. 14 (GOO001-00214966-67) (Tab 127) (YouTube personnel requested searches for Premier League materials.)</p> <p>Levine Ex. 21 (GOO001-00707313) (Tab 85) (“millions of Football goals on YouTube.”)</p> <p>GOO001-00923351-52 (Tab 152) (P. Walker: “I’ll be attending a seminar on Wednesday (tomorrow) in Dublin with heads of several major sports teams and leagues. I would be much appreciated if you could have</p>

	<p>a quick look through the index and post on the sparrow page/take down any clearly infringing, official broadcast footage that you notice from these right holders below... Liverpool Football FC... Chelsea Football FC... Manchester United Football Club... Arsenal Football Club... Sky Sports.”) (GOO001-00923351)</p>
<p>23. By their own analysis of content, including infringing content, on YouTube, Defendants recognize professionally-produced music as among the array of content attracting substantial viewership.</p>	<p>Ellerson Ex. 10 (GOO001-02519867-73) (Tab 22) (Ellerson: “Our opinion – based in particular on the recent analysis... done on query stream data... is that Chad’s initial conclusion [that ‘users... don’t want to watch professionally produced content’] is not correct. This data suggests that our users do want to watch professional content, but we either haven’t yet licensed the content that they’re looking for, or, for content that we have licensed, we are not doing the best job that we can to surface that content for users... Of the Top 100 Playback Queries... Music = [REDACTED] ... Non –Music Premium = [REDACTED] Of ‘Premium’ content queries: ... Sports = [REDACTED]... News = [REDACTED]”) (GOO001-02519869) (emphasis added)</p> <p>King Ex. 2 (GOO001-01403792-93) (Tab 66) (Tony Lee, Technical Product Manager: “Music content is a key element to Youtube’s success. Premium music content is the most watched genre of content on YouTube. Thus, it is imperative that we acquire, and allow content owners to claim, as much content as possible to promote the growth and success of YouTube.”) (GOO001-01403792)</p> <p>Eun Ex. 25 (GOO001-00986823-26; GOO001-00986825-997) (Tab 24) (Seth: “Top 10K queries... “Searches do reflect popularity pretty well... Fresh content is being searched for consistently... Music, TV Shows, Movies, Celebrities, Sports, etc, are definitely our top categories to attack... beckham, rooney (wayne), christiano ronaldo, steven gerrard, fernando torres.”) (GOO001-00986823)</p> <p>B. Hurley Ex. 18 (GOO001-01016964-86) (Tab 41) (Content Lead Discussion – June 26, 2007: “users are searching for lots of things, but primarily for premium content... Music Videos [REDACTED]”) (GOO001-01016969)</p> <p>King Ex. 4 (GOO001-01404022) (Tab 67) (King:</p>

	<p>“From a copyright perspective, clearing music inventory is our most important initiative, so it is highly unfortunate if this does not coincide with our monetization capabilities.”)</p> <p>Karim Ex. 25 (JK00009933-34) (Tab 62) (Karim: “I’d just remove the obviously copyright infringing stuff... “none of the most favorited videos are movies or tv shows. we’re ok cracking down on this content. we’ll leave <i>music videos</i>, news clip and comedy shows for now.”) (JK00009933) (emphasis added)</p>  <p>GOO001-00021120 (Tab 149) (“So the Cherry Lane thing sucks. Had we been in touch and they still sued? I’m just wondering if we should be devoting the entire team’s time to just publishers (and big indies) to try to stem litigation?”)</p>
<p>24. Defendants were aware that the exploitation of music requires the execution of licenses with multiple entities, including publishers, record labels, and performance societies.</p>	<p>King Ex. 18 (GOO001-01905256-64) (Tab 72) (Music Copyright – March 2007 – David King: “Right type: Reproduction, Performance, Distribution, Synchronization... Label – Sound Recordings... Publisher – Compositions... Complex ownership and administration arrangements, and constant movement between publishers...” (GOO001-01905259)</p> <p>K. Walker Tr. 71:24-72:7 (Tab 115) (“music content is perhaps uniquely legally complex because of the number of overlapping and sometimes inconsistent rights associated with it. There are a wide number of different rights that are owned by the performer, the creator, the -- the publishers, the labels, the collecting societies in Europe, et cetera, and each of those entities can own multiple rights, which sometimes align and sometimes do not.”)</p> <p>GOO001-01027023-44 (Tab 154) (“Copyright 101 for YouTube Partners,” to “get permission” when “using</p>